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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION X
1200 Sixth Avenue
Seattle, Washington 98101

In the Matter of: ENVIRONMENTAL PROTECTION AGENCY, Complainant, v. PACIFIC WOOD TREATING CORPORATION, EPA ID No. WAD009036906, Respondent.	No. 1085-09-26-3008P MEMORANDUM IN SUPPORT OF MOTION TO DISMISS OR ALTERNATIVELY FOR AN ACCELERATED DECISION

INTRODUCTION

This is an enforcement action under the Federal Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§6901 et seq., by the U. S. Environmental Protection Agency against Pacific Wood Treating ("PWT"), involving a hazardous waste disposal facility near Ridgefield, Washington. EPA Region 10 has served on PWT a Complaint and Compliance Order alleging violations of certain RCRA interim status standards which appear in 40 CFR Part 265 and requiring PWT to submit to the Agency various documentation and plans to establish compliance with such regulations. This case is yet another example of EPA's unwillingness to accept or, at least, abide by the enforcement scheme envisioned by Congress in enacting

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RCRA. Congress intended maximum Federal/state cooperation in regulating hazardous wastes, with the states developing and enforcing their own RCRA programs in place of the federal program. For reasons that are not entirely clear, EPA has been reluctant to accept this Congressional mandate. This action comes more than two and a half years after EPA first instigated an enforcement action against PWT and then deferred to the State of Washington Department of Ecology ("DOE"). The Agency now asserts that PWT is violating various EPA regulations, despite the fact that PWT complied fully with the earlier DOE enforcement order, which was issued at EPA's direction and with the Agency's full knowledge and concurrence.

I. STATEMENT OF THE CASE

A. Statutory And Regulatory Framework

Before turning to the facts in this case, it is important to establish the statutory and regulatory framework in which it arises.

As the Administrative Law Judge is aware, RCRA is an ambitious statute which provides "cradle to grave" regulation of hazardous wastes. Persons who generate, transport, treat, store or dispose of hazardous wastes all come within the regulatory ambit of RCRA. Responsibility for implementing the Act is lodged with EPA. Beginning in May of 1980, the Agency has promulgated comprehensive regulations, which, among other things, define what substances are hazardous wastes and establish a permit program and

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performance standards for facilities which treat, store or dispose of hazardous wastes ("TSD facilities").

Recognizing the burden the Act imposed on EPA to promulgate final regulations and issue permits to every TSD facility in the United States, Congress included in RCRA a provision whereby a facility could take certain minimal steps to achieve "interim status" and continue operating, pending the promulgation of final performance standards and issuance of a final permit. 42 U.S.C. §6925(e). To qualify for interim status, a TSD facility had to: (1) be in existence on November 19, 1980; (2) notify EPA of its hazardous waste activities; and (3) apply for a permit. The initial permit application is referred to as a "Part A application". 40 CFR §§270.1(b) and 270.13. The interim status performance standards found in 40 CFR Part 265 apply to TSD facilities which achieved interim status.

Section 3006 of RCRA provides that any state may obtain authorization from EPA to administer a hazardous waste program "in lieu of the Federal program." 42 U.S.C. §6926. The Statute and EPA's regulations contemplate two steps in a state's obtaining authorization to administer its own program. A state may first obtain interim authorization by demonstrating its program is "substantially equivalent" to the Federal program. 42 U.S.C. §6926(c). Final authorization must be based on a finding by the EPA Administrator that the state's program: (1) is <u>equivalent</u> to the Federal program; (2) is consistent with programs applicable in

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other states; and (3) provides for adequate enforcement of RCRA. 42 U.S.C. §6926(b).

EPA has employed a two-phased approach to granting interim authorization, designed to coincide with its adoption of regulations implementing various provisions of RCRA. A state receiving Phase I interim authorization could enforce its program with respect to: (1) the identification and listing of hazardous wastes; (2) generators and transporters; and (3) interim status standards. Phase II was divided into two components. Component A allowed a state to issue final permits for containers, tanks, and some surface impoundments and waste piles. Component B covered incinerators. 40 CFR §271.121; 45 Federal Register 33063; 46 Federal Register 7965.

B. Factual Background[1/]

PWT operates a wood preserving facility on the Lake River in southwestern Washington, in the town of Ridgefield. Creosote and pentachlorophenol are utilized in the wood preserving process. This process generates a waste product in the form of a bottom sediment sludge, which EPA has listed as a hazardous waste in its RCRA regulations, bearing hazardous waste No. K001. 40 CFR §261.32. The sludge has a high BTU value. It can be mixed with other wood wastes, such as wood chips and saw dust, to form a suitable energy source. During the energy crunch of the 1970's,

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1/ A complete description of PWT's wood preserving operation is contained in the attached Affidavit of Mark Moothart.

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the use of fuel substitutes, such as wood preserving wastes, to replace oil or natural gas as boiler fuel, was actively encouraged by the Federal Government. In response, PWT developed a Wood Waste Boiler Plant to burn wood wastes along with the sludge. Moothart Affidavit pp. 2-4.

The wood waste/sludge fuel mixture used by PWT consisted of less than one half of one percent wood processing sludge. The remainder of the mixture was composed of non-hazardous wastes. Moothart Affidavit pp. 2-4. When the wood waste mixture was burned, it produced an ash. Although the wood preserving sludge is entirely incinerated, under EPA's expansive definition of hazardous wastes, because the original fuel mixture contained K001, the ash is defined as a hazardous waste. 40 CFR 261.3(c)(2)(i).

In the farmland east of Ridgefield, there is an abandoned brick manufacturing facility known as Ridgefield Brick and Tile ("the RBT site").[2/] Clay used to form RBT's bricks was extracted from a pit on the property, adjacent to the manufacturing facility. After the manufacturing of bricks ceased at the RBT site, the pit was not filled-in. The bottom became filled with storm-water runoff; and, because of its accessibility to youngsters in the area, it became what used to be described in the common law as an attractive nuisance. Moothart Affidavit pp. 4-5.

2/ RBT brick has a rather distinct appearance and is noticeable in many of the homes and buildings in the surrounding area.

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In the late 1970's, the owner of the RBT site approached PWT about the possibility of using wastes from the Ridgefield Plant to fill the pit. At the time this disposal began, the ash was not considered to be hazardous,[3/] nor had it been defined as a RCRA hazardous waste. PWT continued to dispose of the ash on the RBT site after it was defined as a hazardous waste in EPA's RCRA regulations published in May 1980. The disposal continued until January 25, 1983. PWT erroneously believed continued disposal at the RBT site was lawful, for two reasons. First, as noted above, EPA had been heavily involved in development of PWT's wood preserving waste recycling projects; and Agency personnel, who were familiar with the ongoing disposal at the RBT site, expressed no concern over its continued use. Secondly, the RBT site was identified in PWT's RCRA Part A permit application for the Ridgefield Plant. Moothart Affidavit p. 5. Be all of that as it may, the fact remains disposal at the RBT site was unlawful; and it became the subject of an enforcement action.

On January 28, 1983, representatives of EPA Region 10, DOE and PWT met at the Ridgefield Plant. The purpose of this meeting was to discuss whether PWT would apply for a Part B permit for the Ridgefield Plant Wood Waste Burner incinerator. During the course of that meeting, the subject of the RBT site came up. Moothart Affidavit p. 6. Subsequently, on April 21, 1983, EPA sent to PWT

3/ To this day, no one seriously contends the ash is a particularly hazardous substance, in the generic sense.

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a letter, designated as a "Notice of Violation and Warning" (the "NOV"). Exhibit 1. The NOV stated that disposal of hazardous wastes generated at the Ridgefield Plant on the RBT site was a violation of RCRA and regulations adopted thereunder.

Although it initially took the initiative with respect to the RBT site, EPA deferred to DOE to take enforcement action for the RBT violation.[4/] Affidavit of Eric Egbers p. 4. At the time Region 10 issued its NOV to PWT, the State of Washington had obtained neither interim nor final authorization to carry out a hazardous waste program. The State received interim authorization for Phase I and Phase II, Components A and B on August 2, 1983. 48 Federal Register 34954 et seq. The State received final authorization on January 30, 1986. 51 Federal Register 3782 et seq.

From the outset of the enforcement proceeding, DOE viewed the RBT matter as important, because it involved the first land disposal facility closing in the State of Washington. Thus, when DOE took over the enforcement action, it proceeded with care and made sure EPA was kept informed and involved in all key decisions. Egbers Affidavit p. 8.

Immediately upon receiving the Region 10 NOV, PWT undertook to determine what EPA and the State would require to remedy the violation; and PWT began to formulate a plan to close the

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4/ One is reminded of Judge Brown's characterization of an environmental lawsuit a "Battle of Acronyms". API v. EPA, 661 F. 2d 340, 341.

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facility. Moothart Affidavit p. 6. PWT commissioned a groundwater evaluation of the site on May 13, 1983, which resulted in a report entitled "Preliminary Groundwater Investigation". On June 20, 1983, DOE issued "Notice of Penalty Incurred and Due No. DE 83-284" (the "Notice of Penalty"). Exhibit 2. The penalty assessed against PWT was $20,000.[5/] The Notice of Penalty required certain actions by PWT, including, if PWT elected to cease operating the RBT site, the submittal of a closure plan and post-closure plan.

By July 15, 1983, PWT had prepared and submitted to DOE draft closure and post-closure plans.[6/] PWT had been disposing of Wood Waste Boiler Plant ash at the RBT site by filling the pit in stages. By the time the State of Washington took enforcement action, the north end of the RBT pit had been filled with material. As described in the Affidavit of Patrick Wicks, the closure plan envisioned utilizing the pit as an encapsulation area or disposal cell. The bottom of the cell would consist of compacted low-permeability soil and even lower permeability soil to which bentonite clay was added to form a barrier to the leaching of water out of the cell. The ash would be removed from its then present location and placed in the cell; and a compacted soil cap would be placed on the cell. To capture any leachate from the cell, the closure

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5/ DOE, however, deferred collection of the penalty.

6/ The closure of the RBT site is described in detail in the attached Affidavit of Patrick Wicks.

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plan called for installation of a toe drain at the western end of the cell. In addition, an underdrain system was installed beneath the bottom seal to guard against the possibility of upwelling of shallow ground water. The toe drain and underdrain also provide additional monitoring points. Wicks Affidavit pp. 7-10.

The draft closure and post-closure plans were submitted to EPA and DOE. EPA provided comments to DOE, which were incorporated into DOE's comments of August 4, 1983. Egbers Affidavit p. 5; Exhibit 3. EPA submitted written comments on August 10, 1983. Exhibit 4. EPA noted in its written comments that the RBT site "did not qualify for interim status and therefore cannot legally be closed as an interim status facility." On August 18th, representatives of PWT, Region 10 and DOE met in DOE's offices to discuss final closure. Following that meeting, PWT submitted an addendum to its draft closure plan, which incorporated the agencies' comments and established the final closure plan. Wicks Affidavit p. 4; Egbers Affidavit p. 5.

PWT then undertook to carry out the closure plan; and closure was completed on October 16, 1983. Wicks Affidavit p. 5. On October 26, 1983, DOE issued Order No. 83-468 ("the October 1983 Order"), approving the closure and post-closure plans and requiring PWT to carry out a sampling program, which included sampling three drinking water wells downgradient from the disposal cell. Exhibit 5. PWT and its consultants conducted an inspection for purposes of certifying closure of the site on November 16, 1983. DOE inspected the RBT site on December 14, 1983; and, finally, on

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February 15, 1983, PWT submitted a "Report on Certification of Closure of the Ridgefield Brick and Tile Site", which described the closure operation and sampling program. Exhibit 6.

After the August 18th meeting, PWT received no formal communication from EPA for more than a year and a half. Region 10 personnel participated in an inspection of the RBT site on June 12, 1984, and expressed no concern over the closure or post-closure care of the facility. Moothart Affidavit p. 8; Wicks Affidavit p. 18.

Classification of the RBT site was an important question at the outset of DOE's enforcement action. Since the facility had never qualified for interim status, DOE determined that it should be treated as an illegal disposal operation and closed as part of an enforcement proceeding. DOE used Part 265 interim status standards as a guide, but concluded strict adherence with those regulations was not required. All of this was discussed with Region 10 personnel, who approved this approach. Egbers Affidavit pp. 5-6. Indeed, as noted above, in Region 10's comments on PWT's draft closure and post-closure plans, it is pointedly stated the RBT site did not achieve interim status and that closure of the site should include "measures equivalent to the interim status . . . requirements." (Emphasis added) Exhibit 4.[7/]

7/ Between the time Region 10 issued its Notice of Violation and DOE issued its Notice of Penalty, PWT filed a Part A permit application for the RBT site. DOE and EPA treated the

(Footnote Continued)

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II. Argument

A. An Accelerated Decision Dismissing the Complaint And Compliance Order Is Appropriate In This Case.

Under 40 CFR §22.20, the Presiding Officer is authorized to render an accelerated decision in favor of either party, as to all or any part of a proceeding, when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Section 22.20 also empowers the Presiding Officer, at any time, to dismiss an action, upon motion of the respondent, for failure to establish a prima facie case or upon "other grounds which show no right to relief on the part of the complainant". This rule combines, albeit somewhat inartfully, the Federal Rules governing summary judgment and dismissal for failure to state a claim upon which relief can be granted.

As will be seen below, there is ample basis in this case for the Presiding Officer to dismiss the Complaint and Compliance Order, because EPA has not demonstrated it has a right to the relief it seeks in this case. Alternatively, because there are no issues of material fact, an accelerated decision dismissing the Complaint and Compliance Order is, likewise, appropriate.

(Footnote Continued)
application as a nullity, since the site had not achieved interim status. Egbers Affidavit p. 6.

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B. EPA Is Precluded From Bringing This Enforcement Action.

The Complaint in this action alleges the following violations:[8/]

(1) Failure to obtain evidence of financial assurance for post-closure care of the RBT site. (¶ 7.A)

(2) Failure to install adequate groundwater monitoring wells. (¶ 7.B)

(3) Failure to measure sufficient parameters as part of the RBT site ground water monitoring program. (¶ 7.C)

(4) Failure to prepare an outline of a ground water quality assessment program. (¶ 7.D)

(5) Failure to submit an adequate closure plan. (¶ 7.E)

(6) Failure to submit an adequate post-closure plan. (¶ 7.F).

DOE's Notice of Penalty specifically required PWT to submit: (1) evidence of financial assurance (¶ 7.A); (2) a ground water monitoring plan (¶¶ 7.B-7.D); and (3) closure and post-closure plans (¶¶ 7.E-7.F). DOE's October 1983 Order approved PWT's closure and post-closure plans and established groundwater monitoring procedures and parameters. Clearly, then, the violations alleged in the Complaint and Compliance Order were addressed by the State enforcement action. Thus, the only relevant issue in this case is

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8/ References are to paragraph numbers in the Complaint and Compliance Order. These alleged violations will be discussed in more detail later in this brief.

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whether the State's enforcement action was reasonable and appropriate.

1. Prior decisions by EPA Administrative Law Judges hold on similar facts that the Agency is precluded from taking enforcement action.

But for a cryptic ruling by the Administrator of EPA, it could be stated at this point in this brief that the BKK decision if controlling. However, the Administrator cast BKK into a sort of limbo with his "Order on Petition for Reconsideration" in that case. In the Matter of BKK Corporation, Docket No. IX-84-0012, RCRA (3008) 84-5. Nonetheless, the legal reasoning and the logic of BKK may be followed, even if the decision is denied precedential value. In Re Martin Electronics, Inc., "Decision on Motion to Reconsider", RCRA-84-45-R (January 14, 1986). BKK is hardly a radical decision. The Administrative Law Judge in that case simply applied the law to the facts before him--something judges are expected to do--and the Administrator did not reject that interpretation of the law.

The facts in BKK are on all fours with the facts in this case. Since the Administrative Law Judge is well-acquainted with those facts, we will not repeat them in detail. For purposes of this motion, the key similarity is the direct involvement of EPA in the state enforcement action in both cases. As with the RBT site, EPA took the enforcement initiative against BKK and then deferred to the State of California. EPA was kept abreast of negotiations between BKK and the State; and, when BKK and the State were prepared to enter into a final settlement, EPA voiced

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no objection. After reviewing the actions BKK was required to take in response to the settlement agreement with the State, the legislative history of RCRA and decisions under the Clean Air and Clean Water Acts, the Administrative Law Judge concluded that "EPA was precluded under the circumstances from instituting enforcement action based on the same alleged violations." BKK, Opinion and Order on Motion for Accelerated Decision ("Initial Decision"). On appeal, the Chief Administrative Law Judge affirmed the Initial Decision, holding that, where a state has taken reasonable and appropriate action to remedy a violation, EPA cannot take enforcement action for the same violation. BKK, "Final Order" at p. 10.

The Martin Electronics case, supra, is the first case involving a BKK-type fact situation to be decided subsequent to the Administrator's Order in BKK.[9/] Judge Yost directly addressed the question of how to apply BKK. He noted that the Administrator's decision (or non-decision) in that case did not reject the "policy . . . that EPA should stay its hand in the face of reasonable and appropriate [state] enforcement action." He further questioned why the Agency "wants to retain the authority to take duplicative

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9/ Environmental Protection Agency v. Cyclops Corp, Docket No. RCRA-V-W-85-R-002, was decided between the Final Order and Order on Petition for Reconsideration in BKK. The factual differences between the Cyclops case and RBT are obvious. There, the state had failed to take any effective enforcement action over a period of several years. The decision is of interest, however, because it provides a good example of a case where EPA ought to have stepped in and taken enforcement action.

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action." Turning specifically to the question of how to apply BKK, Judge Yost stated:

> In any event, while the Administrator has ruled that the Judicial Officer's decision is to have no precedential effect, one is not precluded from understanding the logic inherent therein and independently adopting it as one's own. Martin Electronics, supra, at p. 6.

The issue before Judge Yost in Martin Electronics was squarely one of whether the state had taken appropriate enforcement action, in assessing a penalty for a groundwater monitoring violation. EPA had sought a $48,000 penalty; and the State of Florida assessed a penalty of only $107. Despite this disparity, Judge Yost held the action by the State to be reasonable and appropriate. The Judge was persuaded by the fact that the State and Martin Electronics had promptly entered into a consent agreement to remedy the violation, rather than resorting to protracted and costly litigation. EPA's approval of the settlement agreement was sought; and the Agency dictated certain of its terms. The same circumstances existed with the RBT site. PWT and the State of Washington promptly agreed to remedy the violation at the RBT site, EPA's approval of the settlement agreement was sought and the Agency dictated certain of its terms.

EPA's current enforcement action is, in all respects, duplicative of the prior State enforcement action. Region 10 is attempting to dredge up matters that were resolved more than two and a half years ago. Applying the reasoning of BKK and following the

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decision in Martin Electronics, EPA is precluded from bringing this enforcement action against PWT.

2. Under the clear language of RCRA, this enforcement action is precluded.

Respondent will not burden the Administrative Law Judge with a recounting of the legislative history of RCRA and the cases which support the proposition that EPA cannot take enforcement action on facts such as those involved in the case of the RBT site. That history and those cases were thoroughly analyzed by the Administrative Law Judge in the Initial Decision in BKK. The legislative history overwhelmingly supports the proposition that Congress intended primary RCRA enforcement responsibility to reside with the states. See BKK Initial Decision at pp. 24-25. The federal courts which have considered analogous provisions of the Clean Air Act and Clean Water Act have repeatedly recognized that states with federally-authorized air and water quality programs have primary enforcement responsibility. See: Save the Bay v. Administrator, 556 F.2d 1282 (5th Cir.1977); United States v. Cargill, Inc., 508 F. Supp. 734 (D. Del. 1981); Shell Oil Co. v Train, 415 F. Supp. 70 (N.D. Cal. 1976) and the discussion of these cases on pages 15-18 of the BKK Initial Decision.

If anything, Congress intended that RCRA involve a greater degree of state autonomy than under either the Clean Air or Clean Water Acts. This is evident from the language of Section 3006 of RCRA, the provision governing authorization of state programs. States which obtain either interim or final authorization may carry out their programs "in lieu of" the federal program. 40 U.S.C.

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§6926(b) and (c). Among the federal environmental statutes, only RCRA contains this "in lieu of" language.

Particularly instructive on the question of the relationship between EPA and state enforcement is the decision of the Ninth Circuit in United States v. ITT Rayonier, Inc., 627 F.2d 996 (1980), which also involved DOE and EPA interaction with respect to a facility located in the State of Washington. At issue was a DOE compliance order issued to ITT Rayonier, under pressure from EPA, for NPDES permit violations. ITT Rayonier challenged the compliance order; and, after the Washington Pollution Control Hearings Board upheld the order, the matter was appealed to the Washington courts, where ITT Rayonier eventually prevailed. While the state court appeal was pending, EPA filed an enforcement action for the same violation in federal district court, which granted a summary judgment in EPA's favor and ordered ITT Rayonier to comply with the permit. On appeal, the Ninth Circuit reversed the district court, holding that, under the Clean Water Act, the relationship between EPA and the State was sufficiently close to apply the doctrine of collateral estoppel to the EPA action. In doing so, the court stated:

> We do not perceive how the need for uniformity under [the Clean Water Act] is best promoted by conflicting judicial constructions and repeated agency prosecutions. [emphasis added] 627 F.2d at p. 1001.

The Ninth Circuit's rationale is equally applicable to RCRA. Congress' desire for uniformity of enforcement under RCRA is no less, and perhaps even greater, than under the Clean Water Act.

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That uniformity cannot be promoted by allowing EPA to bring an enforcement action on the facts in this case.

B. DOE'S Enforcement Action At The RBT Site Was Reasonable And Appropriate.

It is important to remember that neither EPA nor DOE considered the RBT site to be an interim status facility. It was treated as an illegal disposal operation and closed pursuant to an enforcement action. In its comments on PWT's draft closure and post-closure plans, EPA stated, "[t]he disposal site did not qualify for interim status and therefore cannot legally be closed as an interim status facility." Exhibit 4. DOE did not consider strict adherence to the letter of the Part 265 interim status regulations to be necessary. Egbers Affidavit p. 6. Region 10, likewise, did not expect or require strict compliance with the Part 265 requirements. In its comments on the draft closure and post-closure plans, the Agency stated:

> EPA is willing to accept, however, an environmentally sound closure alternative that includes measures equivalent to the interim status closure and post-closure requirements, if such closure and post-closure requirements can be incorporated into an EPA enforceable document such as a consent agreement. Exhibit 4.

While DOE did not enter into a formal consent agreement with PWT, its Notice of Penalty and October 1983 Order approving PWT's closure and post-closure plans were sufficiently enforceable. EPA obviously concurred in this procedure, since it voiced no objection.

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1. EPA's Complaint must be dismissed because it fails to allege that DOE's enforcement action was not reasonable and appropriate.

Because of the existence of the prior state enforcement action, EPA cannot simply allege that PWT is violating interim status standards. Under RCRA and the BKK and the Martin Electronics decisions, the relevant inquiry is whether the State's enforcement action was reasonable and appropriate. Nowhere in its Complaint does EPA allege any aspect of the prior enforcement action was not reasonable and appropriate. The Complaint and Compliance Order are subject to dismissal on that ground alone. However, as will be shown, the Complaint and Compliance Order would be defective even if it included this necessary allegation.

2. EPA cannot treat DOE's enforcement action as a nullity.

The Complaint and Compliance Order is written as if the DOE enforcement action never occurred. Nowhere are the State enforcement action or the prior DOE orders even mentioned. PWT did precisely what it was told to do by DOE; and DOE was operating under instructions from EPA. Both DOE and PWT were specifically told compliance with the Part 265 regulations was not required. All of this was done under the watchful eye of Region 10. EPA cannot now, more than two years after these events occurred, simply pretend they never happened and claim PWT has been violating Part 265 regulations all along.

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3. EPA's approval of the State enforcement action is persuasive evidence that action was reasonable and appropriate.

EPA did more than simply instigate this enforcement action and then withdraw from the fray. Instead, the Agency participated fully in the enforcement action from start to finish. The closure and post-closure plans submitted by PWT were provided to Region 10. Region 10's comments and concurrence in the plans were sought and provided. There is no question EPA approved PWT's plans, since EPA participated in the August 18, 1983 meeting at which the closure and post-closure plans were finalized. Furthermore, the October 1983 Order was discussed with Region 10 personnel; and EPA was provided a copy. Egbers Affidavit pp. 7-8. Clearly, then, EPA considered DOE's actions with respect to the RBT site to be reasonable and appropriate. One could ask for no more persuasive evidence on this point.

4. DOE's enforcement action with respect to each violation alleged by EPA was reasonable and appropriate.

As noted above, the Complaint herein alleges PWT is violating six Part 265 regulations, despite the fact that the DOE enforcement action dealt with the subject matter of each of these regulations. Under RCRA and the reasoning of BKK, the relevant inquiry is whether the DOE enforcement action with respect to the matters covered by these Part 265 regulations was reasonable and appropriate, recognizing that neither EPA nor DOE required strict compliance with Part 265. The violations alleged by EPA are contained

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in paragraph 7 of the Complaint. Discussion of each of these allegations is appropriate.

Paragraph 7.A, §265.145 - The Complaint alleges PWT has not obtained financial assurance for post-closure care of the RBT site, as required by 40 CFR §265.145. The Notice of Penalty required PWT to furnish financial assurance to fund closure and post-closure. However, consistent with the view that the Part 265 regulations were to be used as a guide, DOE did not, in the end, require strict compliance with §265.145. PWT has sought to obtain financial assurance and kept DOE apprised of its efforts. Moothart Affidavit pp. 8-9. This matter can safely be left to the State, which now has final enforcement authority. If, later, PWT fails to satisfy the State's requirement regarding financial assurance and DOE takes no action, then enforcement by EPA might be appropriate.

Paragraph 7.B, §265.91 - EPA alleges PWT has failed to install a sufficient number of ground water monitoring wells. In its closure plan, PWT devised an innovative approach to detecting groundwater contamination. An underdrain system was installed beneath the waste cell and hooked-up to a sampling point. PWT also installed a toe drain to capture leachate from the cell. The leachate is collected and monitored for contaminants. In addition, PWT installed three monitoring wells, known as lysimeters, one up-gradient and two downgradient from the cell, to detect contaminants migrating from the cell. Wicks Affidavit pp. 7-8 and 12. As a final, important check, PWT is required to monitor three

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deep downgradient water wells, to determine whether contaminants from the RBT site are leaching into the drinking water supply. Exhibit 9. This ground water monitoring program was worked out in consultation with DOE representatives. Egbers Affidavit pp. 6-7. In many respects, PWT's plan is superior to the requirements of Part 265. Wicks Affidavit pp. 16-17.DOE was satisfied the program was adequate to detect any ground water contamination emanating from the RBT site; and EPA concurred. Egbers Affidavit p. 7.

Paragraph 7.C, §265.92(b) and (c) - This allegation is that PWT has not analyzed ground water samples for all of the parameters required by 40 CFR §265.92(b) and (c). The analytical parameters established by DOE were appropriate to wastes disposed of on the RBT site. Egbers Affidavit p. 7; Wicks Affidavit pp. 13-14. DOE concluded it had the flexibility to limit these parameters; and its October 1983 Order listed those for which PWT was required to monitor. Exhibit 5.

As explained in the Affidavit of Patrick Wicks, the only hazardous waste potentially associated with the material deposited in the cell on the RBT site is the residue remaining in the ash after incineration of wood preserving sludge which had been mixed with non-hazardous wastes. PWT is monitoring for many of the parameters for which EPA contends PWT should have monitored. Other parameters which EPA contends should be monitored were fully considered in developing the post-closure monitoring parameters and were eliminated, since it is extremely unlikely they would be found in the PWT waste. In addition, PWT is monitoring for

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parameters not covered by Part 265. Wicks Affidavit pp. 13-16. DOE made a technical judgment, which it is within its expertise to make and which EPA approved. That judgment was reasonable and appropriate; and EPA cannot question the call, two years after it was made.

Paragraph 7.D, §265.93(a) - The allegation here is that PWT failed to prepare "an outline of a ground-water quality assessment program." DOE addressed the subject matter of this regulation and concluded it was adequately covered by the closure and post-closure plans, which provided for regular monitoring of the under-drain and toe drain leachate, the lysimeters and drinking water wells in the area. Egbers Affidavit pp. 6-7.

Paragraph 7.E, §265.112 - This is a broad allegation that PWT has failed "to submit a closure plan that is adequate to meet the closure and post-closure requirements for landfills." This allegation is so broad and non-specific that response to it is difficult. To the extent it is intended to cover the specific allegations of prior paragraphs, those have already been addressed. To the extent it is intended to cover other sections of Part 265, it fails to give adequate notice of what is being pleaded and ought to be dismissed.

As previously discussed, neither EPA nor DOE sought to achieve strict compliance with Part 265 standards at the RBT site. PWT's closure and post-closure plans were developed under the direction of DOE, with EPA's full involvement. Those plans called for placement of the hazardous waste in the cell at the RBT site,

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where it would be adequately protected and any impacts on ground water would be monitored. This allegation is clearly directed at matters dealt with by the State enforcement action in a reasonable and appropriate manner. As such, it is subject to dismissal under RCRA, the reasoning of BKK and the precedent established by Martin Electronics.

Paragraph 7.F, §265.118(a)(1) - As with the previous paragraph, the allegation here is a broad assertion of "failure to submit a post-closure plan which is designed to comply with the ground-water monitoring requirements of 40 CFR Part 265 Subpart F." Presumably, this is a catch-all allegation, designed to incorporate the preceding specific allegations of the Complaint. Again, EPA's specific concerns regarding ground water monitoring are addressed above. This allegation is not sufficient to meet the requirements of RCRA as applied in BKK and Martin Electronics.

C. EPA Is Estopped To Bring This Action.

It is well-settled that the doctrine of estoppel may not be applied against the federal government on the same terms as against any other litigant. Heckler v. Community Health Services of Crawford, ___ U.S. ___, 104 S.Ct. 2218, 81 L.Ed.2d 42 (1984). While the Supreme Court has not decided that estoppel may run against the government, the Court has repeatedly left open the possibility that a case for estoppel can be made against the government. Heckler, 104 S.Ct. at p. 2224; United States v. Locke, ___ U.S. ___, 105 S.Ct. 1785, 1790 (footnote 7).

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Lower federal courts have been willing to hold the federal government to be estopped. Home Savings and Loan Association v. Nimmo, 695 F.2d 1251 (10th Cir. 1982), vacated, sub nom. Walters v. Home Savings and Loan Association ___ U.S. ___, 104 S.Ct. 2673; Community Health Services v. Califano, 698 F.2d 615, 620-621, reversed, sub nom. Heckler, supra;

The Initial Decision in BKK (pp. 37-38) acknowledges both the difficulty of estopping the government and the possibility of doing so. In BKK, the Administrative Law Judge found the necessary elements to estop EPA to be:

> BKK was pressured to enter into the settlement agreement, the terms of which EPA was fully aware, by EPA threats of enforcement action, (footnote omitted) and BKK in good faith entered into the settlement, incurring substantial expenses in connection with its implementation . . .

However, the Administrative Law Judge was unwilling to find estoppel applied in BKK, because there was some question as to whether the Agency had received all documents related to the settlement. All of the foregoing elements are present in this case. PWT submitted its closure and post-closure plans and closed the RBT site under pressure of EPA threats of enforcement action. EPA was fully aware of the terms and conditions of PWT's closure and post-closure plans and the October 1983 Order approving those plans. PWT acted in good faith in agreeing to close the RBT site and incurred substantial expenses in doing so.

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The Supreme Court's opinion in Heckler notes one reason not to apply the doctrine of estoppel to the government to be:

> When the Government is unable to enforce the law because the conduct of its agents has given rise to an estoppel, the interest of the citizenry as a whole in obedience to the rule of law is undermined.

That reason does not apply in this case. The issue here is not whether EPA is estopped from enforcing the law. The law was enforced in this case when the RBT site was closed pursuant to DOE's orders. Quite another question is raised by the facts in this case. The issue here is whether, having agreed both to DOE's enforcement of the law and the appropriate steps to achieve compliance (thereby inducing PWT to act), EPA is now estopped from reversing itself and holding PWT to be violating the law for the very acts which EPA earlier agreed constituted compliance.

Although certainly not intending to do so, EPA has effectively laid a trap for PWT, which it now seeks to spring. Having told DOE and PWT strict adherence to Part 265 was not required, the Agency seeks to hold PWT in violation for failing to comply with the very regulations with which PWT was told it need not comply. All of the Part 265 regulations which PWT is alleged to be violating were in effect throughout 1983, when the enforcement action against PWT was undertaken and completed. See 45 Federal Register 33239-33243 (May 19, 1980); 47 Federal Register 16558 (April 16, 1982). Thus, in 1983, EPA could have required PWT to do all of the things it now says PWT must do. The Agency should not be permitted to engage in such capricious enforcement of the law.

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CONCLUSION

There are no issues of material fact in this case and EPA has failed to establish a prima facie case or other grounds showing a right to relief. Therefore, it is appropriate to enter an order dismissing the Complaint and Compliance Order.

Dated this 23rd day of May, 1986.

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